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MEMORANDUM OF LAW

DATE: September 20, 1999

TO: Gerald Chiles, Deputy Director, Personnel

FROM: City Attorney

SUBJECT: Effect of NAFTA Entry Requirements on the City's Civil Service System Requirements

QUESTION PRESENTED

Are the residency requirements of the City's Civil Service system invalid in light of the relaxed entry provisions of the North American Free Trade Agreement [NAFTA]?

SHORT ANSWER

No. The City's residency requirements follow the Immigration and Nationality Act [INA] of 1952, 8 U.S.C. §§ 1101 through 1537, which has not been superseded by more liberal entry provisions of NAFTA.

BACKGROUND

A preliminary minimum qualification for City employment in the classified service is that the applicant be a United States citizen or a person lawfully admitted to the United States for permanent residence. Recently, some Canadian citizens (not permanent residents of the United States), seeking employment with the City have claimed that the City's residency requirements are no longer valid due to changes in the immigration process implemented under the terms of NAFTA. You have asked whether the provisions of NAFTA supersede the existing statutory scheme which governs the immigration and naturalization policy of the United States.

ANALYSIS

I. Historical Background of the Residency Requirement

The current Civil Service permanent residency requirement is codified in Civil Service Commission Rule II, Section 1. The rule provides in subsection (1) that, "[u]nless waived, all applicants must: (1) be citizens of the United States or persons lawfully admitted to the United States for permanent residence pursuant to section 1101(a)(20) of the Immigration and Nationality Act of 1952 . . . ." San Diego Municipal Code § 23.0301(1). The provision allowing permanent residents to apply for Civil Service jobs was added by Ordinance No.1104 in 1978. Prior to the 1978 amendment, only United States citizens were eligible to apply for City employment.

The amendment was added after the Supreme Court decision in *Sugarman v. Dougall*, 413 U.S. 634 (1973). The *Sugarman* case specifically attacked the validity of the civil service rules of the City of New York In *Sugarman*, the Court determined that citizenship requirements for civil service jobs violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In finding citizenship requirements unconstitutional, the Supreme Court said "[I]t is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause. This protection extends, specifically . . . to aliens who 'work for a living in the common occupations of the community.'" *Id*. at 641.

Prior to this decision, the rationale most frequently articulated to legitimize citizenship requirements was that governmental agencies had an overriding interest in having a stable and loyal workforce and that such loyalty could only be guaranteed through the employment of citizens. The rationale did not withstand close judicial scrutiny, as the Court found that citizens were no more likely to be loyal or stable employees than were permanent residents. The Court reasoned that the investment made by permanent residents to maintain their status was as great as any investment a citizen might make. The Court noted that the onerous requirements of citizenship, such as the burden of paying taxes and being subject to military service, are applicable to permanent residents just as they are to citizens. *Id.* at 645. Because permanent residents share the burdens of citizenship, the Court said it was inherently unfair to prohibit them from sharing the benefits of citizenship; access to public jobs being one of those benefits. The Court concluded that the civil service rule at issue in *Sugarman,* and others like it, were "in conflict with Congress' comprehensive regulation of immigration and naturalization . . . [and] encroached upon an exclusive federal power . . . ." *Id.* at 638.

II. Current Immigration and Naturalization Policy

The courts grant great deference to the expansive authority of Congress to regulate immigration and naturalization. "Congress has broad powers to exclude aliens altogether from the United States, or to prescribe terms and conditions upon which they may come into this country." *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1036-1037 (1982) (citations omitted). This is not a power which Congress has taken lightly:

> [A]fter extensive study, Congress passed the Immigration and Nationality Act of 1952, 66 Stat.163, as amended, 8 U.S.C. §§ 1101 et seq. (1976 ed.), as a comprehensive and complete code governing all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents.

Elkins v. Moreno, 435 U.S. 647, 664 (1978). With respect specifically to the right to work in this country, courts have noted there is a strong interest in limiting access to employment.

> [T]he congressional policy is that American labor be protected and that temporary workers be admitted only when it tends to serve the national economy, the cultural interests, and the welfare of the United States, by facilitating the entry for temporary residence of aliens whose specialized experience or exceptional ability would best serve the American needs.

Gannet Corporation v. Stevens, 282 F. Supp. 437, 445 (D.C., Virgin Islands, 1968).

This policy is supported by the extensive regulations for administration of the INA which cover all aspects of immigration. The INA divides aliens into two classes, non-immigrant aliens and immigrant aliens. Immigrant aliens include all aliens seeking residence and/or employment in the United States. The number of immigrant aliens admitted to the United States for legal permanent resident [LPR] status is limited by quota. *Elkins v. Moreno*, 435 U.S. 647 at 664. Non-immigrant aliens are individuals not seeking permanent residence in the United States. Although non-immigrant aliens may seek employment, they may only do so on a temporary basis. *Id.* at 665-666.

The non-immigrant class provides for the needs of persons such as ambassadors of foreign countries who may reside in the United States for many years, but who maintain their permanent residence in their country of origin. It also includes persons whose stay within the United States is temporary, and who have no intent to establish long term residency, such as tourists or students. Entry into the United States by non-immigrant aliens is not limited by a numerical quota. It may, however, be limited in terms of the length of time an individual may stay in the United States.

"In section 101(a) of the IRCA [Immigration Reform and Control Act], Congress set out to preclude the employment of aliens who had neither obtained LPR status nor been granted special employment authorization by the Attorney General." *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2nd Cir. 1991). "LPR status is afforded to certain aliens who are permitted to reside in the United States permanently as immigrants." 8 U.S.C. § 1101(a)(20); *Etuk at* 1436. "IRCA's verification scheme requires that an employer attest that it has confirmed a prospective employee's identity . . . by reviewing one or more statutorily designated documents." *Etuk* at 1437. "[D]omestic employers are subject to both civil and criminal penalties if they knowingly hire an unauthorized alien or fail to comply with the verification process established by the statute." *Id.* at 1437.

Thus, under IRCA, the City as an employer is required to obtain proof of LPR status before offering employment to an immigrant alien. The INS issues documentation to LPR's which allow LPR's to work in the United States and to be eligible for certain benefits. The documentation is commonly known as a green card. "[P]resentation of a green card is not the exclusive manner by which an LPR can establish eligibility to work." *Id.* at 1437. However, possession of a green card is often a prerequisite to obtaining some of the other documents which might be used to establish employment eligibility, such as a social security number or a drivers license. *Id.*

III. How NAFTA Interacts with the Statutory Scheme of the INA

NAFTA is one of many agreements entered into by the United States to develop diplomatic and trade relations with other nations. It supersedes and expands on the earlier United States-Canada Free Trade agreement. "A free trade agreement is an agreement between two or more countries in which each removes tariff and other restrictions on trade with the other party's agreement." *The NAFTA Implementation Act*, Sept. 14, 1993, United States-Mexico-Canada, Legislative History, House Report No.103-361(I), p. 9. Congress has said that NAFTA is the most comprehensive trade agreement ever negotiated and creates the world's largest integrated market for goods and services.

The cornerstone of the agreement is the elimination of all tariffs among the parties. In addition to the removal of tariffs, NAFTA also reduces the number of non-tariff barriers to trade, liberalizes restrictions on investment and services, sets forth strong rules on intellectual property, and establishes environmental safeguards. The agreement will ensure that economic development among the three nations takes place in a way that protects the environment and promotes improved labor conditions. *Id*. at 8.

One non-tariff barrier that hinders the free exchange of goods and services among the parties is the cumbersome visa application process of the current statutory scheme. Therefore, NAFTA relaxes the visa process for non-immigrant aliens and allows temporary entry into the

United States with an expedited visa if the purpose of the person's entry into the United States complies with the terms of the agreement.

Temporary entry for business persons is covered in Chapter 16 of NAFTA, which "reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories." Chapter 16, article 1601 of NAFTA. Annex 1603, section A(c), specifically requires evidence demonstrating "that the business person is not seeking to enter the local labor market." The economic impact of employees working in the United States is mitigated by the fact that their salaries are paid by the parent company in the participating country. Thus, while Chapter 16 facilitates entry into participating countries for the purpose of conducting business, it reiterates the concern of the INA by stressing the importance of admitting temporary workers only when its serves the national economy. NAFTA does not affect the ability of the United States to protect its citizens and permanent residents from the influx of a new labor force which could detrimentally impact the resident workforce.

The provisions of NAFTA dealing with temporary entry reinforce the principle that immigration procedures permitted under the agreement are in addition to, rather than in lieu of, existing immigration law. Chapter 16, article 1603 of NAFTA says "[e]ach Party shall grant temporary entry to business persons who are *otherwise qualified for entry* under applicable measures . . . ." (Emphasis added). This language requires compliance with existing immigration laws before the specific visa provisions of NAFTA may be invoked. Individuals who would otherwise be denied entry to the United States under the INA may not avail themselves of NAFTA provisions because they cannot meet the basic requirements for entry. The provisions of NAFTA are not an alternative to meeting the requirements of the INA.

Under a temporary visa obtained pursuant to NAFTA, an alien would be prohibited from seeking employment in the United States unless the work is performed for and compensated by a business entity located outside the United States. The rigid requirements imposed by NAFTA prohibit an entity based in the United Stated from employing a Canadian citizen who is not a permanent resident of the United States. The legislative history says "nothing in the NAFTA Implementation Act shall be construed to amend or modify any existing law." This direction precludes employment by individuals lacking the employment documentation provided for in the INA. Legislative History, House Report No. 103-361(I) p. 16. The emphasis of both Article 1601 and Annex 1603 is that entry into a participating country by a "business person" should have little to no effect on the labor market of the country of entry. It reaffirms the INA's commitment to protection of the domestic labor work force.

CONCLUSION

NAFTA provides temporary entry for four specific categories of business persons. It does not amend or modify, except to the extent specifically provided for, existing immigration or naturalization laws. Only permanent resident aliens are legally eligible to seek employment in the United States. Thus, the City's permanent resident requirement complies with applicable federal law and is not invalid under the terms of NAFTA.

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